IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 897 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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PATEL VISHNUBHAI MANIBHAI

Versus

PATEL KANTIBHAI BABABHAI

Appearance:

1. Civil Revision Application No. 897 of 2001

MR AJ PATEL FOR MR JAYESH M PATEL for applicants

MR YF MEHTA FOR MR HA MANSURI for opponents

CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 14/08/2001

ORAL JUDGEMENT

Rule. Mr.Y.F.Mehta, learned counsel for Mr.H.A.Mansuri, learned advocate appearing on caveat, waives service of notice of rule on behalf of the opponents.

2. This revision has come up for admission. But at the joint request of the learned counsel appearing for the respective parties, this revision is taken up for final hearing today.

3. Heard learned counsel, Mr.A.J.Patel for Mr.J.M.Patel, learned advocate for the applicants and learned counsel, Mr.Y.F.Mehta for Mr.H.A.Mansuri, learned advocate, who appeared on caveat.

4. This revision under Sec.115 of the Code of Civil Procedure is filed by the present applicants-original defendants challenging the order dated 9-8-2001 passed by the learned Civil Judge (J.D.), Dahegam below application Ex.31 in Regular Civil Suit No.91 of 2001 which was filed by the present opponents-original plaintiffs requesting to appoint Court Commissioner to carry out the commission work into the agricultural field of the plaintiffs on Survey No.325 Block No.270 admittedly of the land belonging to the original plaintiffs.

4.1 Considering the submissions made by the learned advocates appearing for the respective parties, learned Civil Judge (J.D.), Dahegam, granted said application Ex.31 vide his order dated 9-8-2001 appointing Court Commissioner to carry out the commission work against which, present revision is filed.

5. Mr.A.J.Patel for Mr.J.M.Patel, learned counsel for the applicants, has firstly argued that the Court machinery should not be permitted to be used for the purpose of collecting the evidence of parties to prove their case by appointing a Court Commissioner. Secondly, he has argued that the order appointing the Commissioner passed by the Court below is without any jurisdiction. Thirdly he has argued relying upon AIR 1996 (Madras) 347 and AIR 1989 (Orissa) 118 that when the first Commissioner is already appointed and his report is on record, appointing of another Commissioner by the Court for carrying out the same work is without jurisdiction and hence, the impugned order passed by the Court below requires to be set aside and application Ex.31 be dismissed with costs.

6. Mr.Y.F.Mehta for Mr.H.A.Mansuri, learned counsel for the opponents, on the other hand, has argued that the second commission ordered by the Court below upon application Ex.31 submitted by the original plaintiffs is not a successive second commission for the same work and it has nothing to do with the first commission and both

are for different properties having different descriptions and hence, the judgments relied upon by the learned counsel for the applicants will be helpful to the opponents and not the applicants.

7. I have gone through the order dated 9-8-2001 passed by the Court below upon application Ex.31. It is clear that the order appointing Commissioner under challenge is a commission work which is required to be done by the Commissioner as directed by the Court below admittedly upon the agricultural land belonging to the plaintiffs bearing Survey No.325, Block No.270. I have also gone through the first commission report and it appears that the first commission work was ordered at the request of the plaintiffs to ascertain whether there exists a way so as to reach the field of the plaintiffs and said commission work was already completed since long in the presence of the parties. Another commission work ordered by the Court below is entirely on a different footing and it has nothing to do with the first commission work and it is ordered to ascertain whether any agricultural crop is standing in the field of the plaintiffs.

7.1 As argued by the learned counsel for the opponents, second commission work is ordered by the Court to arrive at a proper and just conclusion for deciding the balance of convenience and, therefore, second commission work has nothing to do with the first one and it is not a second successive commission work ordered for brushing up the first commission work.

7.2 There cannot be any dispute on the point raised by the learned counsel for the applicants that Court machinery should not be used for the purpose of collecting evidence to prove the case of the parties. If the Court prima-facie thinks that Court Commissioner is required to be appointed to ascertain the dispute between the parties, then in that case, it can do so. The judgments relied upon by the learned counsel for the applicants will not come in rescue of the applicants as the facts of the present case and that of the judgments relied upon by the learned counsel for the applicants are entirely different and admittedly the order passed upon Ex.31 is not a second commission as argued by the learned counsel for the applicants.

8. Under the circumstances, order dated 9-8-2001 passed by the Court below appointing a Commissioner upon application Ex.31 is just and proper and it has nothing to do with the commission work carried out as per

application Ex.7.

9. In the view of the foregoing discussion, this Civil Revision Application is dismissed subject to the rights and contentions available to the parties before the Court below in pending application. Parties are at liberty to file objections against the report that may be submitted by the Second Commissioner and the commission work carried out pursuant to order passed upon application Ex.31 be treated separately and independently from the commission work that has been carried out pursuant to order passed upon application Ex.7. Rule is discharged.

(R.P.DHOLAKIA,J.)
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